

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:07-CV-174-H(2)

LILIANA MARTINEZ-HERNANDEZ and
ULDA APONTE, both individually
and on behalf of all other
similarly situated persons,

Plaintiffs,

v.

BUTTERBALL, LLC,

Defendant.

ORDER

This matter is before the court on Defendant's Motion to Strike Plaintiffs' Notice of Filing Rebuttal Expert Reports In Support of Objections to Discovery Order. Plaintiffs have responded, and this matter is ripe for adjudication.

On May 21, 2010, United States Magistrate Judge David W. Daniel issued a twenty-eight page order addressing numerous discovery motions. (Order dated May 21, 2010 [DE #390].) Among the issues addressed in that order were plaintiffs' entitlement to a second inspection of defendant's facility and plaintiffs' intent to file an expert report from Dr. Robert Radwin in rebuttal of defendant's expert report on time-motion studies.

Judge Daniel ordered a limited inspection of defendant's facility but denied plaintiffs' request to have Dr. Radwin present for the inspection, concluding that any testimony Dr. Radwin would give based upon the inspection would not be "true rebuttal testimony." (Order dated May 21, 2010 at 25.)

On June 4, 2010, plaintiffs appealed Judge Daniel's order upon filing their written objections pursuant to Rule 72 of the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 72 (allowing party to serve and file objections within 14 days after being served). On June 21, 2010, plaintiffs served upon defendant expert rebuttal reports of Dr. Radwin and Dr. Francis Giesbrecht, plaintiff's expert statistician.¹ The next day, June 22, 2010, thirty-two days after being served with the court's order, plaintiffs filed a Notice of Filing Rebuttal Expert Reports in Support of their Objections ("Plaintiffs' Notice") [DE #404].

Defendant moves this court to strike Plaintiffs' Notice. Defendant argues that Plaintiffs' Notice is untimely, that it proffers new evidence not considered by Judge Daniel, and that Plaintiffs' Notice violates the court's May 21, 2010 order.


¹In the May 21, 2010, order, Judge Daniel determined that plaintiffs should be permitted to file a rebuttal expert report on the statistical invalidity of defendant's expert report and granted plaintiffs an extension of time, through June 21, 2010, to disclose Dr. Giesbrecht's report.

Plaintiffs contend that Dr. Radwin's report is offered in support of their appeal -- to demonstrate that Judge Daniel erred in determining that Dr. Radwin's testimony would not be in rebuttal of defendant's expert report on time-motion studies. Plaintiffs note that due to the court's local rules plaintiffs were not permitted to submit a reply brief in support of their request to have Dr. Radwin present during the second inspection and thus had no opportunity to respond to defendant's argument that the only possible use of a rebuttal report by Dr. Radwin would be to present affirmative time analysis evidence. See Local Civil Rule 7.1(f)(2), EDNC (forbidding reply briefs on discovery matters). Plaintiffs argue that Rule 72 does not forbid offers of proof or the consideration of new matters on appeal, particularly where the new evidence could not have been presented below. Plaintiffs maintain that a review of Dr. Radwin's report is necessary to this court's determination of plaintiffs' appeal.

This court finds no reason, despite the arguments of defendant, to strike the report as a supplement to the objections filed by plaintiffs. The court finds the report to be a proper submission within the framework of a supplement to the objections filed to Judge Daniel's order and will review it

in that light. Defendant's motion to strike [DE #405] is
DENIED.

This 31st day of March 2011.



Malcolm J. Howard
Senior United States District Judge

At Greenville, NC
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